

1 Paul A. Hoffman (Bar No. 146805)
2 John R. Flocken, (Bar No. 97137)
3 Paul Evan Greenwald (Bar No. 57162)

GREENWALD & HOFFMAN, LLP
1851 E. First Street, Suite 860
Santa Ana, California 92705-4039
Telephone No.: (714) 285-0025
Facsimile No.: (714) 285-0028

6
7 Attorneys Specially Appearing for Third-Party Defendants,
ASIA PACIFIC OIL & GAS LTD., a Seychelles
8 Islands entity, AMIRZHAN JAKISHEV, and
ADILZHAN DZHAKISHEV

9
10 UNITED STATES DISTRICT COURT

11 CENTRAL DISTRICT OF CALIFORNIA

12 KAZENERCOM TOO; ET AL.,
13 Plaintiffs,

v.

CIVIL ACTION No. 08:09cv00059-JVS
Assigned for all purposes to:
Hon. James V. Selna; Dept: 10C

15 TURAN PETROLEUM, INC.; ET AL.,
16 Defendants.

Date Action Filed: January 14, 2009
Trial Date: None Set

17
18 TURAN PETROLEUM, INC.,
Defendant and Counterclaimant,
19 v.

SPECIALLY APPEARING THIRD PARTY
DEFENDANTS ASIA PACIFIC OIL & GAS
LTD., AMIRZHAN JAKISHEV, AND
ADILZHAN DZHAKISHEV'S NOTICE OF
MOTION AND MOTION TO DISMISS
VERIFIED SECOND AMENDED THIRD-
PARTY COMPLAINT OF YERKIN
BEKTAYEV AND KANET MEIRMANOV
FOR: (1) INSUFFICIENT SERVICE;
(2) LACK OF PERSONAL JURISDICTION;
(3) FAILURE TO STATE A CLAIM; AND
(4) LACK OF SUBJECT MATTER
JURISDICTION [Fed.R.Civ.Pro.
12(b)(1),(2),(5),(6); 28 U.S.C. §1367(c)]

20 YERKIN BEKTAYEV and KANET
21 MEIRMANOV,
Plaintiffs and Counterdefendant.

[Filed concurrently with: [Proposed] Order;
Declarations of Adilzhan Dzhakishev,
Amirzhan Jakishev & John R. Flocken, Esq

23 TURAN PETROLEUM, INC.,
24 Defendant and Third-Party Plaintiff,
25 v.

26 WELLS FARGO, N.A., YERKIN AKKUZOV,
SABIRGAN DUHALIEV, IGOR MAXIMOV,
27 Defendants in Third-Party Complaint.

1 YERKIN BEKTAYEV and KANET
2 MEIRMANOV,
3 Counterdefendants and Third-Party
Plaintiffs,

4 v.

5 ASIA PACIFIC OIL & GAS LTD.
(incorporated in the Seychelles Islands);
6 AMIRGAN DZHAKISHEV, ADILZHAN
DZHAKISHEV, YURI VANETIK; ROBERT
7 VAN DUREN; ROBIN BISARYA; OKKE
FINANCIAL LTD.; ALCINA COMPANY
8 CORP., PINGTON INVESTMENT LTD.;
PINE BROOK S.A., HINES INVESTMENTS
9 S.A.; ESSEX MANAGERS LTD.; VARRIAL
FINANCIAL TRADING LTD.; COAST
10 FINANCE LTD.; FREEMAN FREEMAN
SMILEY LLP,
11 Third-Party Defendants.

Date: April 30, 2012
Time: 1:30 p.m.
Courtroom: 10C

14 TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

15 PLEASE TAKE NOTICE that on April 30, 2012, at 1:30 p.m., in Courtroom 10C of the
16 Southern Division of the United States District Court for the Central District of California,
17 located at 411 West Fourth Street, Santa Ana, California 92701-4516, Specially Appearing
18 Third-Party Defendants Asia Pacific Oil & Gas Ltd., a Seychelles Islands entity ("Asia Pacific"),
19 Amirzhan Jakishev ("Amirzhan"), and Adilzhan Dzhakishev ("Adilzhan") will and hereby do
20 move for an Order dismissing the Verified Second Amended Third-Party Complaint of Yerkin
21 Bektayev and Kanet Meirmanov, pursuant to Fed.R.Civ.P., Rules 4 and 12(b) and 28 U.S.C.
22 Sec. 1367(c). The moving parties originally filed a Motion to Dismiss (E-Document No. 255)
23 the original Amended Third Party Complaint of Yerkin Bektayev and Kanet Meirmanov, on the
24 same grounds as the present motion, which was set for hearing on August 31, 2009 but, as a
25 result of the Court's dismissal of the Complaint, the moving parties original Motion to Dismiss
26 was rendered moot and not ruled upon. The Ninth Circuit Court of Appeal affirmed the
27 dismissal, but remanded the case to allow the Third Party Defendants to amend their complaint. Third
28 party Plaintiffs thereafter filed the Verified Second Amended Third Party Complaint, which was *merely*

1 **served by mail** on the Third Party Defendants' counsel, who had specially appeared to bring the original
2 Motion to Dismiss. A motion to dismiss is not a responsive pleading, and thus does not constitute an
3 appearance , under F.R.Civ. Pro. Rule 7(a). Thus, Third Party Defendants' original Motion to Dismiss was
4 not an appearance, and service of the Verified Second Amended Third-Party Complaint of Yerkin
5 Bektayev and Kanet Meirmanov, was required to be made pursuant to Fed.R.Civ.P., Rules 4
6 and12(b) and 28 U.S.C. Sec. 1367(c).

7 This Motion is based on the following grounds:

8 1. Insufficient Service. Asia Pacific, Amirzhan, and Adilzhan are foreign citizens
9 that are required to be served pursuant to Federal Rules of Civil Procedure, Rule 4. Third-
10 party Plaintiffs merely served the original Complaint on these third-party defendants by mail
11 and by way of non-parties to this lawsuit, none of which methods were authorized by
12 defendants or by applicable law.

13 2. Lack of Personal Jurisdiction. Asia Pacific, Amirzhan, and Adilzhan have
14 insufficient contacts with California or the United States; they have not consented to personal
15 jurisdiction within the United States; and they were not served in the United States or within
16 this judicial district. Based on a lack of contacts with the forum, forcing the third-party
17 defendants to defend this action in the United States would be unfair, unduly burdensome,
18 and unreasonable under the circumstances.

19 3. Failure to State a Claim. The first claim for RICO fails to state facts constituting
20 a claim against third-party defendants Asia Pacific, Amirzhan, and Adilzhan. The second
21 claim for relief, violation of securities laws, fails to state a claim against third-party defendants
22 Asia Pacific, Amirzhan, and Adilzhan because it fails to name them within the body of the
23 count for securities violations and the elements of securities fraud are not alleged with the
24 required specificity as to any of the defendants. The claim for fraudulent transfer also fails to
25 state a viable legal claim against them.

26 4. Lack of Subject Matter Jurisdiction. Since the federal claims fail to state a claim
27 against these moving defendants, this Court lacks subject matter jurisdiction over the third-
28 party defendants because the remaining claims are pendent state law claims over which this
3

Court has no original jurisdiction and because there is no diversity jurisdiction in this case against the moving defendants.

3 Conference of Counsel. Prior to making the original motion to dismiss, defendants counsel met
4 and conferred with the previous attorney for the Third Party Plaintiffs, Alina Sorkin, Esq. At that time the
5 insufficient service of the Verified Amended Third Party Complaint was discussed with Third Party Plaintiffs'
6 prior counsel and, when asked whether she would be properly serving the same on Third Party
7 Defendants', Ms. Sorkin said she would not. Prior to filing the present Motion to Dismiss, counsel for Third
8 Party Defendants' made several attempts to contact the Third Party Plaintiffs' new attorney, John T.
9 Schreiber, to discuss the subject of the deficient service of the original Verified Amended Third Party
10 Complaint and improper service of the Verified Second Amended Third Party Complaint. To date, neither
11 Ms. Sorkin nor the third party plaintiff's new attorney, John T. Schreiber, have attempted to correct the
12 deficient service by employing one of the methods authorized by Fed.R.Civ.P. 4(f). (See Declaration of
13 John. R. Flocken, Esq., filed concurrently with this Motion.)

14 This Motion is based on the Notice of Motion, the Motion, the Memorandum of Points
15 and Authorities, the Declarations of Adilzhan Dzhakishev and Amirzhan Jakishev, and the
16 exhibits attached thereto, the moving parties' original Motion to Dismiss (Doc. No. 255) and
17 the Memorandum of Points and Authorities thereon, the Verified Second Amended Third-
18 Party Complaint and Cross-Claim on file in this Action, the Court's file, and any other evidence
19 or argument that the Court permits at or before the hearing.

20 | Dated: April 2, 2012

GREENWALD & HOFFMAN, LLP

/s

John R. Flocken, Esq.
Paul A. Hoffman, Esq.
Attorneys Specially Appearing for Third-Party
Defendants ASIA PACIFIC OIL & GAS LTD., a
Seychelles Islands entity, AMIRZHAN
JAKISHEV, and ADILZHAN DZHAKISHEV

MEMORANDUM OF POINTS AND AUTHORITIES

I. PROCEDURAL BACKGROUND AND SUMMARY OF ARGUMENT.

A. Procedural Background.

The original complaint in this case was filed on August 4, 2008. The original Verified Amended Third-Party Complaint against these moving Third Party Defendants, Asia Pacific Oil & Gas Ltd. ("Asia Pacific"), Amirzhan Dzhakishev ("Amirzhan"), and Adilzhan Jakishev ("Adilzhan") was not filed until at least March 16, 2009. As explained below, the Amended Third Party Complaint was never validly served on these Third Party Defendants, Asia Pacific, Amirzhan, or Adilzhan. Third Party Defendants, Asia Pacific, Amirzhan, or Adilzhan, therefore filed a Motion to Dismiss the Amended Third Party Complaint (E-Doc. No. 255), which was set for hearing on August 31, 2009. However, at that time, as a result of the Court's dismissal of the Complaint, the Third Party Defendants' Motion to Dismiss the Amended Third Party Complaint was rendered moot, and not ruled upon.

14 Following an appeal to the Ninth Circuit Court of Appeal, that Court affirmed the
15 dismissal of the securities claim in the Amended Third Party Complaint, but remanded the
16 case in order to allow the Third Party Complainants to amend their complaint. Thereafter,
17 Yerkin Bektayev and Kanet Meirmanov, filed a Verified Second Amended Third-Party
18 Complaint, which was ***merely served by mail*** on the Third Party Defendants' counsel, who
19 had specially appeared to bring the original Motion to Dismiss.

20 Third Party Defendants' original Motion to Dismiss the Amended Third Party Complaint
21 was not a responsive pleading, and therefore did not constitute a general appearance, under
22 F.R.Civ.Pro. Rule 7(a). Service of the Third Party Complainants' Verified Second Amended
23 Third-Party Complaint was required to be affected as provided under applicable sections of
24 F.R.Civ.Pro. Rule 4, as discussed below, and service thereof by ordinary mail on counsel only
25 was improper and ineffective. Third Party Defendants, Asia Pacific, Amirzhan, or Adilzhan,
26 therefore renew their Motion to Dismiss for insufficient service of process of the Amended
27 Third-Party Complaint and, by extension, the present Second Amended Third Party

1 Complaint, as well as their motion to dismiss based on lack of personal jurisdiction, failure to
2 state a claim, and lack of subject matter jurisdiction.

3 **B. Summary of Argument.**

4 As with the original Amended Third Party Complaint, the Second Amended Third Party
5 Complaint is a classic case of a party and its attorney overreaching to try to create federal
6 jurisdiction where none exists. In Counts 1 and 2 of their Second Amended Third-Party
7 Complaint, Third Party Plaintiffs (“Plaintiffs”) try to allege a RICO (Count 1) and a federal 10b-5
8 claim (Count 2), as well as several other unsupported federal statutory claims, as the “hook” to
9 get the Court to rule on a multitude of state law claims in Counts 3 through 10. Each of these
10 claims should be dismissed as against the moving third party defendants, Asia Pacific Oil &
11 Gas Ltd., Amirzhan Jakishev, and Adilzhan Dzhakishev (“Defendants”).

12 First, the Second Amended Third-Party Complaint should be dismissed as against
13 these moving Defendants because there was insufficient service of process of the *original*
14 Third-Party Complaint. Fed. R. Civ. Proc., Rule 4 and 12(b)(5). Plaintiffs merely mailed the
15 third party summons and complaint to Adilzhan Dzhakishev’s prior residence in Kazakhstan
16 and the California residence of a non-party to this lawsuit. Defendants never waived their
17 rights of service and never consented to being served in this manner. Accordingly, the service
18 of the Amended Third-Party Complaint and Summons was defective as to each of the
19 Defendants and the motion to dismiss should be granted for this reason alone.

20 Second, this Court lacks personal jurisdiction over any of the moving Defendants
21 because Defendants lack sufficient contacts with California or the United States to create
22 either general jurisdiction or specific jurisdiction over Defendants in this case. Defendants
23 have not consented to personal jurisdiction within the United States, and they have not been
24 served in the United States or within this judicial district. Based on the lack of minimum
25 contacts with the forum, it would be unfair, unduly burdensome, and unreasonable under the
26 circumstances to require them to appear and defend the present case and, therefore,
27 Defendants’ motion to dismiss should be granted for this additional reason.

1 Third, Counts 1 (RICO) and 2 (Violation of Securities Laws), the only counts on which
2 there is arguably any federal question jurisdiction, fail to state a claim against these moving
3 Defendants. Insufficient facts are alleged to state a RICO claim against these moving
4 Defendants in Count 1, which merely alleges that these defendants were part of the alleged
5 RICO conspiracy on the part of other defendants because the duration and number of
6 some alleged “conversations” between the other defendants, somehow “gives rise to an
7 inference of awareness” as to the nature of the alleged scheme by these moving
8 Defendants. Further, these defendants are not named anywhere in Count 2 and, there are
9 no allegations in this Count sufficient to state a claim against the moving Defendants. For
10 these reasons, Counts 1 and 2 should be dismissed as against the moving Defendants.

11 Fourth, Count 2 also fails to satisfy the heightened pleading requirements of the Private
12 Securities Litigation Reform Act of 1995, 15 U.S.C. § 78u-4(b) (“PSLRA”) and Federal Rule of
13 Civil Procedure Rule 9(b), by, among other things: (1) failing to allege the elements of
14 securities fraud with the required particularity as to each moving defendant (e.g.,
15 misrepresentations, omissions); (2) failing to allege the required “scienter” facts as to each
16 defendant; and (3) failing to allege loss causation.

17 Fifth, Count 7 (Fraudulent Transfer) fails to allege facts sufficiently to state a claim
18 against these moving Defendants.

19 Sixth, since Counts 1 and 2 are the sole basis for federal question jurisdiction and they
20 fail to state a claim, and these moving Third Party Defendants are not diverse from the Third
21 Party Plaintiffs, there is no subject matter jurisdiction in this case against the moving
22 Defendants and the remaining pendent state law claims must therefore be dismissed against
23 these moving Defendants for lack of subject matter jurisdiction. 28 U.S.C. § 1337(c).

24 II. **FACTUAL BACKGROUND.**

25 A. **Fact Background As To Asia Pacific: Service And Personal**
26 **Jurisdiction.**

27 With regard to jurisdiction, defendant Asia Pacific is an entity organized in the
28 Seychelles Islands and has its principal place of business in the United Kingdom. It has not

1 imported, sold, or otherwise provided any goods or services to consumers in the State of
2 California or anywhere else within the United States.¹ (Dzhakishev Decl., ¶ 6.) Asia Pacific
3 does not own or lease any real property in California or elsewhere in the United States. (*Id.*)
4 Asia Pacific has no offices and does not advertise or market in the United States, has not
5 applied for a loan or opened a bank account with any financial institutions in California or the
6 United States, and has not, previous to the present lawsuit, sought use of the courts within the
7 State of California or the United States. (*Id.*)

8 With regard to service, Third Party Plaintiffs allege that Asia Pacific “engages in
9 business in the U.S. and internationally” and “is subject to the jurisdiction of this Court because
10 it was used for the unlawful transfer of 20% of the assets represented by the rights under the
11 Concession, because it became involved with Turan’s assets in California, and because [Asia
12 Pacific] was a transferee of assets in violation of the California Uniform Fraudulent Transfer
13 Act.” (Verified Second Amended Third Party Complaint, ¶ 5; alleged in ¶ 6 of original Amended
14 Third-Party Complaint.) None of these allegations are true or have any basis in fact.
15 (Dzhakishev Decl., ¶ 7.)

16 Moreover, Third Party Plaintiffs unsuccessfully tried to serve Asia Pacific at Adilzhan’s
17 and Amirzhan’s prior residence in Kazakhstan and at the California residence of a third party,
18 even though such third party is not authorized to accept service on behalf of them or on behalf
19 of Asia Pacific. (Dzhakishev Decl., ¶ 5.) Nor is such California resident an employee, officer,
20 director, or managing or general agent for Asia Pacific. (*Id.*)

21 B. **Factual Background As To Individual Defendants: Service And**
22 **Personal Jurisdiction.**

23 _____
24 ¹ On January 7, 2009, Asia Pacific entered into two related agreements in Costa Mesa,
25 California. (Dzhakishev Decl., ¶¶ 10-15.) In the first agreement, Asia Pacific agreed to
26 purchase 20 percent of the shares of a Kazakhstan company, named Turan Enerpetroleum,
27 LLP, from its parent company, Turan Petroleum, Inc., a Nevada corporation, as well as an
28 option to purchase 10,000,000 shares of Turan Petroleum, in exchange for \$5,000,000.00
(U.S.), which Asia Pacific paid to Turan. (*Id.* & **Ex. 5.**) In the second agreement, Turan
Petroleum agreed to grant Asia Pacific an option to purchase 10,000,000 shares of its stock at
\$0.25 per share. (*Id.* & **Ex. 6.**) Both agreements are governed by foreign law and relate to the
purchase of shares of foreign companies. (*Id.*) No services have been performed pursuant to
these agreements. (*Id.*)

With regard to jurisdiction, defendants Amirzhan and Adilzhan are citizens of Kazakhstan. (Dzhakishev Decl., ¶¶ 1, 8; Jakishev Decl., ¶¶ 1, 6.) Amirzhan is a resident of Kazakhstan and, at the time of the alleged service, Adilzhan had a temporary visa to study in the United States. (*Id.*) Although both of them have traveled a couple of times to California, Adilzhan never lived here before 2008 and does not have an intention of taking up permanent residence in California or the United States. (*Id.*) Neither of them has imported, sold or otherwise provided any goods or services to consumers in the State of California or anywhere else in the United States. (Dzhakishev Decl., ¶¶ 6, 10; Jakishev Decl., ¶¶ 5-6.) Amirzhan does not own any real property in California or the United States. (*Id.*) Although Adilzhan has entered into several transactions for student housing and entered discussions regarding a potential contract in New York, the moving parties have not conducted or solicited business in California or the United States. (*Id.*) Neither of them has maintained a place of business, or ever been served with process or papers for any lawsuit, in California or the United States. (*Id.*)

With regard to service, Third Party Plaintiffs allege that Amirzhan and Adilzhan are subject to the personal jurisdiction of the Court because they are principals of Asia Pacific and were “involved in the unlawful transfer of Turan’s stock, causing approximately \$5 million in proceeds to be fraudulently transferred in California in violation of Cal. Civ. Code § 3439 and other applicable law.” (Verified Second Amended Third Party Complaint, ¶¶ 6-7.) Third Party Plaintiffs additionally allege as to Adilzhan that he did these things while he was a “resident of California” and “signed an agreement with certain other Defendants regarding the transfer of the concession rights at issue.” (*Id.*, at ¶ 6.) None of these allegations are true or have any basis in fact. (Dzhakishev Decl., ¶ 9; Jakishev Decl., ¶ 7.)

Moreover, Third Party Plaintiffs unsuccessfully attempted to serve Amirzhan and Adilzhan at their prior residence in Kazakhstan and at the California residence of a third party, even though such third party is not authorized to accept service on their behalf. (Dzhakishev Decl., ¶¶ 3-5; Jakishev Decl., ¶¶ 2-4.) Nor is such third party an employee or agent for them. (*Id.*)

1 **III. THE SECOND AMENDED THIRD PARTY COMPLAINT SHOULD BE**
2 **DISMISSED BECAUSE NEITHER IT NOR THE ORIGINAL COMPLAINT**
3 **WERE EVER PROPERLY SERVED ON THE MOVING THIRD PARTY**
4 **DEFENDANTS.**

5 A party is permitted to challenge insufficient service by way of a motion to dismiss.
6 Fed. R. Civ. P. 12(b)(5). With regard to serving a foreign entity, Rule 4 of the Federal Rules of
7 Civil Procedure provides in pertinent part:

- 8 (h) . . . Unless federal law provides otherwise or the defendant's waiver has been
9 filed, a . . . ***foreign corporation, or a partnership*** or other unincorporated
association that is subject to suit under a common name, ***must be served***:
- 10 (1) ***in a judicial district of the United States:***
- 11 (A) in a manner prescribed by Rule 4(e)(1) for serving an individual;
12 or
13 (B) by ***delivering a copy*** of the summons and of the complaint ***to an***
14 ***officer, a managing or general agent, or any other agent***
15 ***authorized*** by appointment or by law to receive service of
process and – if the agent is one authorized by statute and the
statute so requires – by also mailing a copy of each to the
defendant; or
- 16 (2) ***at a place not within any judicial district of the United States, in any***
17 ***manner prescribed by Rule 4(f) for serving an individual,*** except
18 personal delivery under (f)(2)(c)(i).
- 19 (f) . . . Unless federal law provides otherwise, an individual . . . may be served at a
20 place not within any judicial district of the United States:
- 21 (1) ***by any internationally agreed upon means of service that is***
22 ***reasonably calculated to give notice, such as those authorized by the***
23 ***Hague Convention*** on the Service Abroad of Judicial and Extrajudicial
Documents;
- 24 (2) ***if there is not internationally agreed means***, or if an international
25 agreement allows but does not specify other means, ***by a method that is***
26 ***reasonably calculated to give notice:***
- 27 (A) ***as prescribed by the foreign country's law*** for service in that
28 country in an action in its courts of general jurisdiction;
 (B) ***as the foreign authority directs*** in response to a letter rogatory
 or letter of request; or

1 (C) unless prohibited by the foreign country's law, by:

- 2 (i) **delivering a copy** of the summons and of the
3 complaint **to the individual personally, or**
4 **using any form of mail** that the clerk addresses
5 and sends to the individual and **that requires a**
signed receipt, or

- 6 (3) by other means not prohibited by international agreement, **as the court**
7 **orders.** (Emphasis added.)

8 Once service is challenged, the plaintiff has the burden of establishing that service
9 was valid under Rule 4. *Brockmeyer v. May*, 383 F.3d 798, 801 (9th Cir. 2004).

10 **A. Plaintiffs Failed To Serve The Moving Third-Party Defendants**
11 **Within This Judicial District.**

12 As set forth in FRCP 4(h)(1)(B), Plaintiffs can serve a foreign entity within the judicial
13 district by **delivering** the service papers to "an officer, a managing or general agent, or any
14 other agent" **and then mailing** a copy of the papers to the entity defendant. The service
15 documents may be delivered to someone "not an officer" but who has "substantial
16 responsibility" for the affairs of the business entity. Rutter Group, *Cal. Prac. Guide: Fed. Civ.*
17 *Pro. Before Trial*, Ch. 5-F, ¶ 5:205. "A managing agent is one authorized to transact all
18 business of a particular kind at a particular place and must be vested with powers of discretion
19 rather than being under direct superior control." *Bridgeport Music, Inc. v. Rhyme Syndicate*
20 *Music*, 376 F.3d 615, 624 (6th Cir. 2004).

21 In this case, the third party that Plaintiffs purportedly served on behalf of Asia Pacific,
22 Amirzhan and Adilzhan, was and is not one of the "officers, managing or general agents" of
23 Asia Pacific. Nor is such third party authorized by appointment or by law to receive service of
24 process on behalf of any of these Third-Party Defendants. (Dzhakishev Decl., ¶ 5.) Plaintiffs
25 cannot satisfy process on the Third-Party Defendants by conveniently asserting, without proof,
26 that an unnamed third party is the "agent" or "nominee" of the Defendants or is "affiliated" with
27 them in some way. While it may be convenient for Plaintiffs, it is not sufficient. Plaintiff "has
28 the burden of proof regarding both the fact of the agency relationship and the scope of the
agent's authority." *Romak USA, Inc. v. Rich*, 384 F.3d 979, 985 (8th Cir. 2004); *Griggs Group*

1 *Ltd v. Filanto Spa*, 920 F.Supp. 1100, 1102 (D.Nev. 1996). Absent adequate proof, Plaintiffs'
2 service is plainly insufficient.

3 **B. Plaintiffs Also Failed To Serve The Moving Third-Party Defendants**
4 **In Accordance With Rule 4(f), The Hague Convention Regarding**
5 **Service, Or By Another Method Reasonably Calculated to Provide**
6 **Notice Under Rule 4(f)(2).**

7 Having failed to serve these moving Third-Party Defendants within the judicial district,
8 Third Party Plaintiffs were required to serve these Defendants in compliance with FRCP, Rule
9 4(f). As set forth above, FRCP Rule 4(f) authorizes service of process on foreign business
10 entities “by an internationally agreed means reasonably calculated to give notice, such as
11 those means authorized by the Hague Convention” Fed.R.Civ.P. 4(f)(1), 4(h)(2).

12 The Seychelles Islands is a signatory to the Hague Service Convention that governs
13 service of process. Accordingly, the validity of service abroad on Asia Pacific “is controlled by
14 the Hague Convention.” *Brockmeyer, supra*, 383 F.3d at 801; *Volkswagenwerk*
15 *Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 705 (1988) (“[C]ompliance with the Hague
16 Convention is mandatory in all cases to which it applies.”). Even California’s service
17 procedures are subject to Hague Convention limitations. Cal. Code Civ. Proc. § 413.10(c)
18 (“These rules are subject to . . . (Hague Service Convention.”). Service pursuant to the
19 Hague Convention may be effected by forwarding the summons and complaint to the “Central
20 Authority” for the country in which service is to be made, along with a form Request for Service
21 containing, *inter alia*, a form Summary of the Documents to be served. See FRCP Rule 4,
22 Pocket Part annotations, Hague Convention Arts. 2, 3, and 5. Once the Central Authority has
23 completed service, it must “complete a Certificate in the form of the model annexed to the . . .
24 Convention,” detailing “the method, the place, and the date of service” or explaining why
25 service did not occur, and thereafter must forward the completed Certificate “directly to the
26 applicant.” *Id.*, Art. 6.

27 By contrast, the nation of Kazakhstan is not a signatory to the Hague Service
28

1 Convention, so defendants Amirzhan and Adilzhan could only be served “by a method that is
2 reasonably calculated to give notice,” such as a method prescribed by the law of Kazakhstan
3 for service in an action in its courts of general jurisdiction, as the legal authority of Kazakhstan
4 directs pursuant to a letter rogatory, or by “using any form of mail that the clerk addresses and
5 sends to the individual and that requires a signed receipt,” or by other means “as the court
6 orders.” FRCP Rule 4(f)(2),(3).

7 Under any of the alternative standards of Rule 4(f) for either Hague Convention service
8 or non-Hague Convention service, Plaintiffs have plainly failed to adequately serve these
9 moving Third-Party Defendants. Plaintiffs attempted to serve them by delivering or mailing
10 them to Adilzhan’s and Amirzhan’s former residence in Kazakhstan in a manner which did not
11 comply with Kazakhstan law (see Dzhakishev Decl., ¶ 3) and by mailing three separate
12 envelopes to the California residence of a third party (who is not the agent of any of the Third-
13 Party Defendants), located at 33 Skyridge, Newport Coast, California 92657. (See **Exhibits 1,**
14 **2, and 3**, attached to Dzhakishev Decl.) None of the moving Third-Party Defendants reside, or
15 were served, at these locations or have their place of business there. (Dzhakishev Decl., ¶ 3-5;
16 Jakishev Decl., ¶ 2-4.) Nor is such third party authorized to accept service of process on
17 behalf of any of the Third-Party Defendants. (*Id.*) After Defendants raised this defect in their
18 June 16, 2009 meet and confer conference (which took place prior to Defendants’ Motion to
19 Dismiss Third Party Complaint that was rendered moot by the Court’s dismissal of the case),
20 Plaintiffs never even attempted to correct their defective service by employing one of the
21 methods authorized by Rule 4(f). (See Hoffman Decl., ¶ 2, filed with original motion to
22 dismiss.) To date, there has been no known attempt to properly serve the Third Party
23 Complaint, or the newly filed Second Amended Third Party Complaint. Therefore, service on
24 the Third-Party Defendants was, and is, clearly insufficient. See *Brockmeyer, supra*, 383 F.3d
25 at 805.

26 Accordingly, for each of the foregoing reasons, the Verified Second Amended Third-
27 Party Complaint must be dismissed as against these moving Third-Party Defendants because
28 of insufficient service of process. FRCP, Rule 12(b)(5).

1 **IV. THE AMENDED THIRD PARTY COMPLAINT SHOULD BE DISMISSED**
2 **BECAUSE THERE IS NO PERSONAL JURISDICTION OVER THE MOVING**
3 **THIRD PARTY DEFENDANTS.**

4 **A. Plaintiffs Have The Burden Of Proof To Establish Personal**
5 **Jurisdiction.**

6 Pursuant to Fed.R.Civ.P. 12(b)(2), a party is permitted to challenge personal jurisdiction
7 by way of a motion to dismiss. Once personal jurisdiction is challenged, the plaintiff has the
8 burden of establishing jurisdiction. *Butcher's Union Local No. 498 v. SDC Inv., Inc.*, 788 F.2d
9 535, 538 (9th Cir. 1986); *Sher v. Johnson*, 911 F.2d 1357, 1361 (9th Cir. 1990). A plaintiff
10 cannot "simply rest on the bare allegations of its complaint." *Amba Marketing Systems, Inc. v.*
11 *Jobar Int'l, Inc.*, 551 F.2d 784, 787 (9th Cir. 1977).

12 **B. There Is No Traditional Basis For Jurisdiction In This Case.**

13 The traditional bases for personal jurisdiction are service within the state, domicile, or
14 consent. *Pennoyer v. Neff*, 95 U.S. 714, 733 (1877). None of the moving Third-Party
15 Defendants (1) were served in this state or in the United States (see above); (2) are domiciled
16 here; or (3) consented to personal jurisdiction.² Absent one of the traditional bases for
17 jurisdiction, due process requires "minimum contacts . . . such that the maintenance of the suit
18 does not offend traditional notions of fair play and substantial justice." *International Shoe Co.*
19 *v. Washington*, 326 U.S. 310, 316 (1945).

20 **C. There Are No Minimum Contacts With These Moving Defendants.**

21 Even though there is a federal claim under a statute that provides for nationwide
22 service of process, the exercise of personal jurisdiction cannot violate due process. *Holland*
23 *America Line Inc. v. Wartsika North America, Inc.*, 485 F.3d 450, 461 (9th Cir. 2007); *Rocke v.*
24 *Canadian Auto. Sports Club*, 660 F.2d 395, 398 (9th Cir. 1981); *Core-Vent Corp. v. Nobel Inds.*
25 *AB*, 11 F.3d 1482, 1484-85 (9th Cir. 1994). Due process requires an adequate basis for

26
27 ² According to Local Rule 8-1, the "statutory or other basis for the exercise of jurisdiction by this
28 Court shall be plainly stated in the first paragraph of any document invoking this Court's
jurisdiction." Plaintiffs fail to allege a valid basis for the Court to exercise personal jurisdiction
over these moving Third-Party Defendants.

jurisdiction, which can be found by, among other things, minimum contacts with the forum state. *International Shoe*, *supra*, 326 U.S. at 316. The purpose of requiring minimum contacts is to prevent the burdens of litigating at a distant or inconvenient forum and to insure that the states do not reach out beyond the limits of their sovereignty. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291-92 (1980) (defendant's "conduct and connection with the forum State" must be such that the defendant "should reasonably anticipate being haled into court there").

1. Defendants' Contacts With The Forum Do Not Establish General Jurisdiction.

In order to find the existence of personal jurisdiction, the Court may examine whether there is (1) general jurisdiction or (2) specific jurisdiction. In order to find general jurisdiction, there must be a finding of substantial, continuous, and systematic contacts between the defendant and the forum state. *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437, 447-48 (1952).

15 Here, Asia Pacific is a Seychelles Islands partnership with its principal place of
16 business in the United Kingdom. Amirzhan and Adilzhan are citizens of Kazakhstan.
17 (Dzhakishev Decl., ¶ 1, 8; Jakishev Decl., ¶ 1, 6.) Amirzhan is a resident of Kazakhstan and,
18 at the time of the purported attempted service, Adilzhan had a temporary visa to study in the
19 United States. (*Id.*) Although both of them have traveled occasionally to California, Adilzhan
20 has never lived here before 2008 and Amirzhan has no intentions of taking up permanent
21 residence in California or the United States. (*Id.*) Asia Pacific, Adilzhan, and Amirzhan have
22 not imported, sold or otherwise provided any goods or services to consumers in the State of
23 California or anywhere else in the United States. (Dzhakishev Decl., ¶ 6; Jakishev Decl., ¶ 5.)
24 Asia Pacific and Amirzhan do not own or lease any real property in California or the United
25 States. (*Id.*) None of them has any offices, and they do not advertise or market, in the United
26 States. (*Id.*) Amirzhan and Asia Pacific have not applied for a loan or opened a bank account
27 with any financial institutions in California or the United States. (*Id.*) None of them has sought
28 use of the courts within the State of California or the United States. (*Id.*) None of them has

1 ever been personally served with process or papers for any lawsuit in California or the United
2 States. (*Id.*) Accordingly, there are no substantial, continuous, or systematic contacts between
3 the Defendants and the forum state sufficient to find general jurisdiction over these
4 Defendants.

5 **2. Defendants' Contacts With The Forum Do Not Establish Specific**
6 **Jurisdiction.**

7 Specific jurisdiction depends upon a showing that a non-resident defendant
8 purposefully established contacts with the forum state, that a plaintiff's cause of action arises
9 out of the defendant's forum-related contacts, and that the forum's exercise of personal
10 jurisdiction comports with fair play and substantial justice. *Burger King v. Rudzewicz* (1985)
11 471 U.S. 462, 472, 476-78. The three-part test for determining the existence of specific
12 jurisdiction are:

13 (1) The nonresident defendant must do some act or consummate some
14 transaction with the forum or perform some act by which he purposefully avails
15 himself of the privilege of conducting activities in the forum, thereby invoking the
16 benefits and protections of its laws; (2) the claim must be one which arises out
17 of or results from the defendant's forum-related activities; and (3) exercise of
jurisdiction must be reasonable. *Panavision Intern., L.P. v. Toeppen*, 141 F.3d
1316, 1320 (9th Cir. 1998) (emphasis added).

18 A "purposeful" contact is one in which a particular defendant has deliberately directed
19 its activities at the residents of the forum state or has deliberately availed itself of the benefits
20 and protections of the laws of the forum state. *Hanson v. Denckla*, 357 U.S. 235, 253-54
(1958).

21 In the present case, as citizens of Kazakhstan, Amirzhan and Adilzhan have done
22 nothing that establishes any purposeful contact with, or avails them of the benefits of, the
23 forum state. As a resident of Kazakhstan, Amirzhan does not even live here and rarely travels
24 here and has not entered into any contracts here. (Jakishev Decl., ¶¶ 1, 6.) Adilzhan's only
25 real connection with the forum state was that he had a temporary visa to study here.
(Dzhakishev Decl., ¶¶ 1, 8.) Neither of them conducts or solicits business in California or the
26 United States. (Dzhakishev Decl., ¶ 10; Jakishev Decl., ¶ 6.)

1 In the case of Asia Pacific, Third Party Plaintiffs allege that a single transaction, on
2 January 7, 2009, in which Asia Pacific agreed to purchase 20 percent of the shares of a
3 Kazakhstan company, named Turan Enerpetroleum, LLP, after a solicitation from its
4 parent company, Turan Petroleum, Inc., a Nevada corporation, as well as an option to
5 purchase 10,000,000 shares of Turan Petroleum, in exchange for \$5,000,000.00 (U.S.),
6 was enough to invoke this Court's specific jurisdiction. (Dzhakishev Decl., ¶¶ 10-11
7 and **Exhibits 4 through 6** attached thereto.) However, the mere existence of a
8 contract with a party in the forum state does not constitute sufficient minimum contacts
9 for the exercise of personal jurisdiction. *Burger King*, *supra*, 471 U.S. at 475-78.
10 Moreover, both agreements are governed by **foreign law** and relate to the purchase of
11 shares of **foreign companies**. (Dzhakishev Decl., ¶¶ 11.) Furthermore, Asia Pacific
12 has not been able to exercise the stock option to purchase the shares of Turan
13 Petroleum and no services have been performed pursuant to these agreements. (*Id.* at
14 ¶ 12.)

15 Since the foregoing transaction is governed entirely by foreign law and concerns the
16 purchase of shares only in two foreign entities, there is nothing in Asia Pacific's actions which
17 shows that it is invoking the benefits and protections of California laws and the fact that the
18 agreements were signed in California is solely because Asia Pacific's director was a student in
19 California at the time the contract was signed. (Dzhakishev Decl., ¶ 13.) Accordingly, Asia
20 Pacific did not purposefully avail itself of the privilege of conducting activities within California
21 because the signing of those agreements in California was merely incidental.

22 Plaintiffs allege that Defendants are subject to the jurisdiction of this Court because of
23 (1) the allegedly unlawful transfer of at least 20% of Turan Petroleum's stock in Turan
24 Enerpetroleum, (2) Defendants' fraudulent transfer of proceeds in California, and (3)
25 Defendants' knowing violation of California's Uniform Fraudulent Transfers Act. (Verified
26 Second Amended Third Party Complaint, ¶¶ 5-7; also alleged at ¶¶ 5-7 of the original Verified
27 Third Party Complaint.) None of these alleged activities are sufficient to exercise personal
28 jurisdiction over the Defendants.

1 First, the transfer of 20% of Turan Enerpetroleum's stock merely represents a **stock**
2 **purchase or investment**, not a purchase or transfer of assets, **in a Kazakhstan company**
3 whose primary purpose is to explore and develop oil and gas fields **in Kazakhstan**.
4 (Dzhakishev Decl., ¶ 14.) This foreign stock purchase was concerned with development of a
5 foreign oil concession and it is merely incidental that the agreement was signed in California.
6 No California assets, interests, or companies were involved in this transaction. Thus,
7 Defendants clearly were not performing some act by which they purposefully availed
8 themselves of the privilege of conducting activities in California. Moreover, the place of
9 execution of the contract does not show that Asia Pacific was invoking the benefits and
10 protections of California law because both agreements are clearly governed by foreign, not
11 California, law. (Dzhakishev Decl., ¶ 14, and **Exhibits 5 and 6**.)

12 Second, Asia Pacific clearly did not receive any monies from this transaction, as shown
13 on the face of **Exhibits 5 and 6**. Instead, Asia Pacific **paid \$5,000,000** (U.S.) to make a stock
14 investment in two foreign companies. (*Id.*) Therefore, there is no foundation in fact to
15 Plaintiffs' allegation that Defendants were the recipients of any proceeds "fraudulently
16 transferred in California" (Second Amended Third Party Complaint, ¶¶ 5-7) because Asia
17 Pacific **paid** these monies, and did not **receive** any of these monies. Accordingly, Plaintiffs'
18 allegations regarding fraudulently transferring proceeds in California lack any foundation and
19 cannot form the basis for demonstrating that Defendants purposefully availed themselves of
20 the privilege of conducting activities within California.

21 Finally, since Defendants did not receive any monies or funds from the foregoing
22 investment transaction, there is simply no basis for the alleged fraudulent transfer action and
23 Defendants' allegedly knowing violation of California's Uniform Fraudulent Transfer Act has no
24 factual foundation. Accordingly, for the foregoing reasons, this allegation also cannot support
25 the exercise of personal jurisdiction over the Defendants.

26 The second part of the test for determining the existence of specific jurisdiction states
27 that the "claim must be one which arises out of or results from the defendant's forum-related
28 activities." *Panavision, supra*, 141 F.3d at 1320. In the present case, Plaintiffs' claims do not

1 arise out of Amirzhan's forum-related activities because he has visited California only a couple
2 of times on vacation unrelated to any facts in the Verified Amended Third-Party Complaint.
3 (Jakishev Decl., ¶ 6.) Plaintiffs' claims also do not arise out of Adilzhan's forum-related
4 activities because at the time of the purported "service" he was in California solely pursuant to
5 a study visa. (Dzhakishev Decl., ¶ 16.) Finally, although one can assert that Plaintiffs' claims
6 do arise out of Asia Pacific's stock purchase transaction on January 7, 2009, as shown above,
7 those activities were clearly not illegal, did not harm anyone, did not purport to purposely avail
8 Asia Pacific of the privilege of conducting activities in California, and did not invoke the benefits
9 or protections of California law. Therefore, these claims are not sufficient to invoke specific
10 jurisdiction over the Defendants.

D. Exercise of Personal Jurisdiction Over These Moving Defendants Would Be Unreasonable.

13 Even if there were “minimum contacts,” the exercise of personal jurisdiction must also
14 be reasonable. In determining reasonableness, courts consider multiple factors, including (1)
15 the extent of defendant’s purposeful availment, (2) burden on defendant in defending the
16 action in the forum, (3) most efficient judicial resolution of the controversy, (4) importance of
17 the forum to plaintiff’s interest, and (5) existence of alternative forums. *Core-Vent Corp., supra*,
18 11 F.3d at 1486-87.

19 Where all other burdens and factors are equal, the burden on defendant in defending
20 the action locally is likely to be decisive. *Terracom v. Valley Nat'l Bank*, 49 F.3d 555, 561 (9th
21 Cir. 1999) (“[T]he law of personal jurisdiction is asymmetrical and is primarily concerned with
22 the defendant’s burden.”). *Rocke, supra*, 660 F.2d at 399 (“A primary concern under a due
23 process analysis is with the burden placed upon the defendant.”) This is especially true of
24 foreign defendants. *Asahi Metal Industry Co., Ltd. v. Superior Court*, 480 U.S. 102 (1987);
25 *Rano v. Sipa Press, Inc.*, 987 F.2d 580, 588 (9th Cir. 1993) (“higher jurisdictional barrier”
26 required for aliens).

27 In the present case, it is unreasonable to require Defendants to defend this action in the
28 United States. Defendants are foreign citizens and entities that have not provided products or

1 services to residents of the forum and that have no place of business or dealings in California
2 or the United States. The vague allegations regarding transfer of stock and receipt of monies
3 are insufficient to support a *prima facie* case for personal jurisdiction.

4 V. **THE SECOND AMENDED THIRD PARTY COMPLAINT FAILS TO STATE A**
5 **CLAIM AGAINST THE MOVING THIRD PARTY DEFENDANTS BECAUSE**
6 **IT DOES NOT ALLEGE ANY MATERIAL FACTS AGAINST THESE**
7 **MOVING THIRD PARTY DEFENDANTS.**

8 A defendant may move to dismiss the complaint where it fails to state a claim upon
9 which relief can be granted. Fed.R.Civ.P. 12(b)(6). The complaint must be construed on the
10 assumption that all of its allegations are true, even if doubtful in fact. *Bell Atlantic Corp. v.*
11 *Twombly*, 550 U.S. 544 (2007). However, a court need not accept as true conclusory
12 allegations, legal characterizations, unreasonable inferences, or unwarranted deductions of
13 fact. *Transphase Systems, Inc. v. Southern Calif. Edison Co.*, 839 F.Supp.711, 718
14 (C.D.Cal. 1993); *Beliveau v. Caras*, 873 F.Supp. 1393, 1395-96 (C.D.Cal. 1995).

15 As shown below, in the present case, each of the nine counts specifies “all
16 defendants,” but, except for Counts 1, 2 and 8, fails to name or allege any facts against these
17 third party Defendants. The term “Defendants” is used within every count, but is nowhere
18 defined. Defendants Asia Pacific, Amirzhan, and Adilzhan are only named specifically, and
19 briefly, in Count 1 (RICO), and Count 8 (Fraudulent Conveyances).

20 A. **Third Party Plaintiffs Fail to State a RICO Claim in Count I.**

21 With respect to Count 1 (RICO), the sum total of the allegations that mention these
22 Defendants in the Second Amended Third Party Complaint are: “...and the APOG
23 parties named herein were also part of the enterprise.” (Second Amended Third Party
24 Complaint, at ¶ 166.) In addition, at ¶ 201, the Third Party Plaintiffs allege, again in
25 conclusory fashion, that “[t]he APOG defendants were part of this RICO conspiracy”
26 because, “[t]he duration” and “number” of some alleged “conversations” between the
27 other defendants, somehow “gives rise to an inference of awareness on the APOG
28

1 defendants' part as to the nature of the scheme." (*Id.* at ¶ 201:24-25.) These
2 allegations fall far short of what is required to state a RICO claim.

3 As the court explained in *Fireman's Fund Ins. Co. v. Stites* (CA 9th 2001) 258
4 F.3d 1016, 1021:

5 "...there are four elements in a criminal RICO case. To obtain a
6 conviction, the government must prove that the defendant engaged in: 1)
7 conduct 2) of an enterprise 3) through a pattern 4) of racketeering
8 activity. 18 U.S.C. §1962 (add. cite omitted.) To prevail on a civil RICO
9 claim, a plaintiff must prove all of these elements, and, in addition, show
10 that the defendant caused injury to his business or property. 18 U.S.C.
11 §1964(c). This fifth element includes two related components. First, a
12 civil RICO plaintiff must show that his injury was proximately caused by
13 the fraudulent conduct. (Cite omitted.) Second, the plaintiff must show
14 that he has suffered a concrete financial loss by documenting the amount
15 of damages to which he is entitled."

16 Here, the Plaintiff's conclusory allegation that "[t]he APOG defendants were
17 part of this RICO conspiracy" because, "[t]he duration" and "number" of some alleged
18 "conversations" between the other defendants, somehow "gives rise to an inference of
19 awareness on the APOG defendants' part as to the nature of the scheme" fails to
20 meet even one of these elements.

21 B. **Third Party Plaintiffs Fail to Allege A Fraudulent Conveyance.**

22 Count 8 alleges Fraudulent Conveyances, if one reads this claim in conjunction with
23 Paragraphs 271 through 274 of the Verified Second Amended Third Party Complaint.
24 Paragraphs 271 through 274 allege on information and belief that defendant Karabayev
25 attempted to fraudulently transfer part or all of Turan's interest in the oil concession (Turan's
26 main and only corporate asset) to Asia Pacific, and to keep the proceeds thereof, by selling
27 such interest to defendants Amirzhan and Adilzhan, who allegedly own the controlling shares
28 of Asia Pacific, for the price of \$5 million. (Verified Second Amended Third Party Complaint,
¶ 271 through 274.) Paragraphs 6 and 7 further allege that Defendants were "involved in
the unlawful transfer of Turan's assets, causing approximately \$5 million in proceeds to be
fraudulently transferred . . ." That is the full extent of any specific allegations against the

1 moving Defendants herein. Clearly such allegations are not sufficient to support any cause
2 of action against the moving Defendants.

3 C. Third Party Plaintiffs Fail to Allege A Securities Fraud Claim.

4 In Count 2, Plaintiffs have attempted to plead a Rule 10b-5 securities fraud claim
5 against “all defendants.” There are six basic elements of a Rule 10b-5 claim: (1) a ***material***
6 ***misrepresentation (or omission)***; (2) ***scienter***, i.e., a wrongful state of mind; (3) ***a***
7 ***connection with the purchase or sale of a security***, (4) reliance, often referred to in cases
8 involving public securities markets (fraud-on-the-market cases) as “transaction causation;” (5)
9 economic loss; and (6) ***“loss causation,”*** i.e., a causal connection between the material
10 misrepresentation and the loss. *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 341-
11 342, 125 S.Ct. 1627, 161 L.Ed.2d 577 (2005).

12 To help curb abuses in securities fraud cases, Congress enacted the Private Securities
13 Litigation Reform Act (“PSLRA”), which applies heightened pleading standards to securities
14 fraud actions. 15 U.S.C. § 78u-4(b)(1). Among other things, the PSLRA imposes a
15 heightened standard for pleading the defendant’s state of mind, i.e., scienter, and the plaintiff
16 must satisfy the heightened pleading requirements of Rule 9(b), which are designed “to give
17 defendants notice of the particular misconduct which is alleged to constitute the fraud charged
18 so that they can defend against the charge and not just deny that they have done anything
19 wrong.” *Neubronner v. Milken*, 6 F.3d 666, 671 (9th Cir. 1993); Fed. R. Civ. Pro. 9(b). In order
20 to adequately provide the required notice, “the complaint must specify such facts as the times,
21 dates, places, and benefits received, and other details of the alleged fraudulent activity.” *Id.* at
22 672.

23 As explained below, Plaintiffs have failed to allege at least four of the elements of a
24 Rule 10b-5 claim with sufficient particularity against any of these moving Defendants.

25 D. Third Party Plaintiffs Do Not Have Standing to Bring A Securities Fraud
26 Claim As To These Moving Third Party Defendants.

27 As a threshold requirement, only a purchaser or seller of securities has standing to
28

1 assert a claim under 15 U.S.C. § 78j. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723,
2 754 (1975) (the requirements of Section 78j are not satisfied where the claimant seeking
3 damages has not actually purchased or sold shares of stock); *Unity House, Inc. v. North*
4 *Pacific Investments, Inc.*, 918 F.Supp. 1384, 1389-90 (D. Haw. 1996) (“Standing to sue under
5 Section 10(b) or Rule 10b-5 is limited to purchasers and sellers of securities.”)

6 In the present case, as with the original Third Party Complaint, there are **no**
7 **allegations in the entire Verified Second Amended Third Party Complaint that Plaintiffs**
8 **purchased any securities from or sold any securities to any of the moving Defendants.**
9 Furthermore, there are no allegations that defendants Amirzhan or Adilzhan purchased or sold
10 any securities at all, only that they were “involved in the unlawful transfer of Turan’s assets.”
11 (Verified Second Amended Third Party Complaint, ¶¶ 6-7.) As to defendant Asia Pacific, the
12 only allegation is that it received a fraudulent transfer of part or all of Turan’s interest, held in
13 Turan Enerpetroleum, of a oil and gas concession to Asia Pacific. (See Verified Second
14 Amended Third Party Complaint, ¶ 5.) None of these allegations show that Plaintiffs were
15 involved as either a seller or buyer for these securities. Thus, Plaintiffs do not have any
16 standing to assert a claim under Section 10(b) or Rule 10b-5.

17 **E. Third Party Plaintiffs Have Not Alleged A Misrepresentation or Omission on**
18 **the First Count.**

19 In order to state a claim under Rule 10b-5, a plaintiff must allege either “an untrue
20 statement of a material fact” or an omission of “a material fact necessary in order to make the
21 statements made, in the light of the circumstances in which they were made, not misleading.”
22 15 U.S.C. § 78u-4(b)(1).

23 In addition, “the complaint shall specify each statement alleged to have been
24 misleading, [and] the reason or reasons why the statement is misleading.” *Id.* Allegations
25 stated on “information and belief” are treated differently: “[I]f an allegation regarding the
26 statement or omission is made on information and belief, the complaint shall state with
27 particularity all facts on which that belief is formed.” *Id.*

1 Third Party Plaintiffs have failed to allege either a misleading statement or an omission
2 of a material fact by any of the moving Defendants, i.e., their first count is based solely on Asia
3 Pacific's receipt of Turan Enerpetroleum stock. (Verified Second Amended Third Party
4 Complaint, ¶¶ 205-239, *in passem*.)

5 This fact renders the second count deficient for at least two (2) reasons.

6 First, Third Party Plaintiffs have failed to allege that the stock was received in
7 connection with any misstatements or omissions by the moving Third Party Defendants.

8 Second, "a pleader must identify the individual who made the alleged representation
9 and the content of the alleged representation." *Glen Holly Entertainment, Inc. v. Tektronix,*
10 *Inc.*, 100 F.Supp.2d 1086, 1094 (C.D. Cal. 1999). Here, Third Party Plaintiffs have failed to
11 allege that any of the moving Defendants made any statements or omissions at all, let alone in
12 connection with the sale or purchase of securities.

13 **F. Third Party Plaintiffs Have Failed to Allege Scienter on the Second Count.**

14 Furthermore, Third Party Plaintiffs have failed to plead scienter properly under the
15 PSLRA, which requires plaintiffs to "state with particularity facts giving rise to a strong
16 inference that the defendant acted with the required state of mind." 15 U.S.C. § 78u-4(b)(2).

17 The Supreme Court has stated: "To determine whether the plaintiff has alleged facts
18 that give rise to the requisite 'strong inference' of scienter, a court must consider plausible non-
19 culpable explanations for the defendant's conduct, as well as inferences favoring the plaintiff."
20 *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 127 S.Ct. 2499, 2510, 168 L.Ed.2d
21 179 (2007).

22 A complaint will survive a motion to dismiss "only if a reasonable person would deem
23 the inference of scienter cogent and at least as compelling as any opposing inference one
24 could draw from the facts alleged." *Tellabs*, 127 S.Ct. at 2510.

25 "Plaintiffs proceeding under the PSLRA can no longer aver intent in general terms of
26 mere 'motive and opportunity' or 'recklessness,' but rather, must state specific facts indicating
27 no less than a degree of recklessness that strongly suggests actual intent." *In re Silicon*
28 *Graphics Inc. Securities Litig.*, 183 F.3d 970, 979 (9th Cir. (Cal.) 1999).

1 The PSLRA also requires a plaintiff to plead scienter with respect to those individuals
2 who actually made the false statements. *Glazer Capital Management, LP v. Magistri*, 549
3 F.3d 736, 745 (9th Cir. (Cal.) 2008) (allegations of collective scienter not permitted); *In re
4 Hansen Natural Corp. Securities Litig.*, 527 F.Supp.2d 1142, 1157 (C.D. Cal. 2007) (holding
5 insufficient allegations of scienter; group pleading doctrine rejected). Moreover, “a pleading of
6 scienter may not rest on a bare inference that a defendant ‘must have had knowledge of the
7 facts.’” *In re Advanta*, 180 F.3d 525, 539 (3d Cir. 1999) (citation omitted).

8 In the present case, Plaintiffs have failed to plead **any** facts that demonstrate the
9 requisite degree of scienter by **any** of the moving Defendants, much less by **each** defendant.
10 The Court therefore is obligated to dismiss the first count with prejudice since Plaintiffs have
11 failed to comply with the strict pleading requirements under PSLRA and Rule 9(b).

12 **G. Third Party Plaintiffs Have Failed to Allege Loss Causation Against These**
13 **Moving Defendants.**

14 In order to state a claim under Section 78j, it is imperative that the plaintiff allege both
15 transaction causation and loss causation. *Hatrock v. Edward D. Jones & Co.*, 750 F.2d 767,
16 773 (9th Cir. 1984); 15 U.S.C. § 78u-4(b)(4); *Binder v. Gillespie*, 184 F.3d 1059, 1065 (9th Cir.
17 1999). As to the moving Defendants, Third Party Plaintiffs have not and cannot allege this
18 element because neither of them purchased or sold the Turan Enerpetroleum stock that
19 defendant Asia Pacific purchased. Furthermore, since Asia Pacific was never permitted to
20 exercise the option to purchase Turan stock, Third Party Plaintiffs cannot show transaction or
21 loss causation with respect to the moving Defendants.

22 **H. Third Party Plaintiffs Have Failed to Allege a Viable Fraudulent Transfer**
23 **Claim Against These Moving Defendants.**

24 Even as to the one claim (Count 8 for Fraudulent Conveyances) in which they did
25 specifically name these moving Defendants, the Verified Second Amended Third-Party
26 Complaint still fails to allege a viable cause of action. A fraudulent conveyance is a “transfer
27 by the debtor of property to a third person undertaken with the intent to prevent a creditor from
28 reaching that interest to satisfy its claim.” *Yaesu Electronics Corp. v. Tamura*, 28 Cal.App.4th

1 8, 13 (1994). In order to establish a fraudulent conveyance, three things or elements must be
2 pled and proved: First, there must be a conveyance or the creation of an obligation; second,
3 the transferor must be, at the time of the conveyance, insolvent or the conveyance must
4 render him insolvent; third, the conveyance must have been made, or the obligation incurred,
5 without a fair consideration. *Estate of Heigho*, 186 Cal.App.2d 360, 365-66 (1960).

6 In the present case, Plaintiffs have not alleged that any of the moving Defendants are
7 judgment debtors. Nor have they alleged that, at the time of the purported conveyance,
8 Defendants were insolvent or were rendered insolvent by the conveyance. Nor have they
9 alleged that the conveyance occurred without a fair consideration. Therefore, a valid claim for
10 fraudulent conveyance under California law has not been stated.

11 **VI. THE PENDENT STATE CLAIMS MUST ALSO FAIL AS TO THESE MOVING**
12 **THIRD PARTY DEFENDANTS AND, THEREFORE, SUBJECT MATTER**
13 **JURISDICTION IS ENTIRELY ABSENT AGAINST THESE MOVING THIRD PARTY**
14 **DEFENDANTS.**

15 In *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), the Supreme Court held that a
16 federal court may exercise supplemental jurisdiction over related state law claims only if the
17 state and federal claims derive from a common nucleus of operative facts and are the types of
18 claims that the Court would ordinarily be expected to try together in one proceeding.

19 The *Gibbs* concepts were modified and to some extent restricted by the enactment of
20 28 U.S.C. § 1337. For the extent of the modification, see *Executive Software v. United States*
21 *District Court*, 24 F.3d 1545 (9th Cir. 1994), *overruled on other grounds by California*
22 *Department of Water Resources v. Powerex Corp.*, 533 F.3d 1087 (9th Cir. 2008). *Executive*
23 *Software* holds in general that dismissal or remand may occur where the case meets the
24 general *Gibbs* tests (see also § 1337(a)) only under the circumstances set forth in § 1337(c).

25 Subsection 1337(c) lists four situations where the Court may decline to exercise
26 supplemental jurisdiction: (1) the state law claims raise a novel or complex question of state
27 law; (2) the ***state law claims substantially predominate*** over the federal law claims; (3) the
28 ***federal claims have been dismissed***; or (4) in exceptional circumstances, there are other

1 compelling reasons for declining jurisdiction (emphasis added). The Court may decline
2 supplemental jurisdiction over pendent state claims under the first three provisions without any
3 explanation because the statute codifies most of the applications already recognized by courts.
4 *San Pedro Hotel Co. Inc. v. City of Los Angeles*, 159 F.3d 470, 478-79 (9th Cir. 1998). Only if
5 the Court declines supplemental jurisdiction under the fourth provision must the Court
6 articulate the “exceptional circumstances” to decline jurisdiction. *Id.*

7 In the present case, it is undisputed that only Counts 1 and 2 attempt to allege any
8 federal claims, and Counts 3 through 9 allege only pendent state claims.³ Based on the sheer
9 number and volume of state vs. federal claims, it therefore appears that the state law claims
10 substantially predominate over the two federal claims, i.e., Counts 1 and 2. Accordingly, for
11 this reason alone, this Court may decline the exercise of supplemental jurisdiction in this case.

12 However, an even more compelling reason exists to decline jurisdiction over the
13 pendent state claims: For the reasons stated above, the federal claims in this case should be
14 dismissed against the moving Defendants because Third Party Plaintiffs fails to state a viable
15 federal claim against any of the moving Defendants. Therefore, if this Court finds that Counts
16 1 and 2 do not state a viable federal claim, it may dismiss all of the pendent state claims. 28
17 U.S.C. § 1367.⁴

18 ///

19 ///

20 ///

21

22

23

24

25

26 ³ Although the caption of the Verified Second Amended Third Party Complaint identifies a total of ten
27 (10) Claims, as with the original Third Party Complaint, there are still actually a total of nine (9) claims
alleged in the body of the pleading itself.

28 ⁴ Plaintiffs do not allege diversity jurisdiction in their Verified Third-Party Complaint.

1 **VII. CONCLUSION.**

2 For the foregoing reasons, these moving Third Party Defendants respectfully request
3 that the Court grant this Motion in its entirety and dismiss this Action against Third Party
4 Defendants Asia Pacific Oil & Gas Ltd., Amirzhan Dzhakishev, and Adilzhan Dzhakishev.

5 Dated: April 2, 2012

GREENWALD & HOFFMAN, LLP

6 By: /s

7 John R. Flocken, Esq.

8 Paul A. Hoffman, Esq.

9 Attorneys Specially Appearing for Third-Party
10 Defendants ASIA PACIFIC OIL & GAS LTD.,
11 AMIRZHAN DZHAKISHEV, and ADILZHAN
12 DZHAKISHEV

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28